

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Application of	)	
ALEE CELLULAR COMMUNICATIONS	)	WT Docket No. 02-28
	)	
For Authorization To Construct	)	File No. 11025-CL-P-672-A-89
Nonwireline Cellular System in	)	
Texas RSA 21 Market 672A	)	

**MEMORANDUM OPINION AND ORDER, HEARING DESIGNATION  
ORDER AND NOTICE OF OPPORTUNITY FOR HEARING**

**Adopted: February 8, 2002**

**Released: February 22, 2002**

By the Commission:

**I. INTRODUCTION**

1. Before the Commission is a petition for reconsideration filed by Alee Cellular Communications (Alee) of the dismissal of the above-captioned application for the block A cellular authorization in the Texas 21 RSA, Market 672.<sup>1</sup> As discussed below, there are substantial and material questions of fact as to whether Alee is qualified to hold the subject cellular authorization. The Commission previously held that Alee made false statements to the Commission, lacked the candor required of licensees, and accordingly was not qualified to hold a cellular license for the New Mexico 3 RSA (NM 3), block A, call sign KNKN271.<sup>2</sup> For the reasons discussed below, we are granting the petition for reconsideration in part, reinstating the above-referenced application, and designating the application for hearing, for the limited purpose of determining whether the applicant is currently qualified to hold the Texas 21 authorization in light of its disqualification for the NM 3 cellular authorization.

**II. BACKGROUND**

2. The issue in this proceeding arises from our previous holding in the so-called *Algreg* proceeding. Specifically, Alee's NM 3 authorization was designated for hearing and possible revocation, along with additional RSA applications and licenses, in connection with participation in a risk-sharing

<sup>1</sup> Alee Cellular Communications Petition for Reconsideration, File No. 11025-CL-P-672-A-89 (filed Mar. 16, 2000) ("Alee TX21 Petition for Reconsideration"); *see also* In the Matter of Application of Alee Cellular Communications for Authorization to Construct Nonwireline Cellular System in Texas RSA 21 Market 672, *Memorandum Opinion and Order*, 15 FCC Rcd 2831 (2000) ("Texas 21 Dismissal Order").

<sup>2</sup> In re Applications of ALGREG Cellular Engineering, et al., *Memorandum Opinion and Order*, 12 FCC Rcd 8148, 8172-8181 (1997) (*Algreg I*), pet. for recon. denied, *Memorandum Opinion and Order and Order on Reconsideration*, 14 FCC Rcd 18524, 18533-18535 (1999) (*Algreg II*), aff'd, *Alee Cellular Communications v. FCC*, No. 99-1460 (D.C. Cir. Jan. 30, 2001), pet. for rehearing denied (D.C. Cir. Apr. 5, 2001), pet. for writ of cert. denied (S.Ct. Oct. 9, 2001).

arrangement at the time of filing of the applications.<sup>3</sup> In addition, the NM 3 license was designated due to alien ownership concerns and for lack of candor.<sup>4</sup> The Commission concluded that Alee's lack of candor in connection with the NM 3 authorization warranted revocation of the license.<sup>5</sup>

3. The Commission observed that Alee's NM 3 application was filed on August 12, 1988, and included a listing for Shafi M. Sharifan, a four percent general partner who was an alien. Under the policies then in effect, having a non-U.S. citizen or entity holding any general partnership interest was absolutely disqualifying.<sup>6</sup> Less than two months later, on September 23, 1988, Sharifan's interest was transferred to Amir R. Riahi-Shiraz (a U.S. citizen). Alee won the NM 3 lottery a few months later, and filed a section 1.65 amendment on January 9, 1989. That amendment, signed by Robert Bernstein (Alee's signing partner and largest equity holder at the time) and prepared by Alee's attorney, William Franklin, listed Sharifan (not Riahi-Shiraz) as a partner *and* inaccurately stated that all partners were U.S. citizens. More than a year later, on April 30, 1990, Alee filed a letter disclosing the errors in the application and a section 1.65 amendment – stating that Sharifan was not a U.S. citizen and that his partnership interest had been sold to a U.S. citizen several months before the section 1.65 amendment was signed and filed. All of Alee's applications and the NM 3 amendment were signed by Bernstein. The Commission further concluded, based on its independent review of the record,<sup>7</sup> that “[a] preponderance of the evidence establishes that Alee, understanding that this was a matter that could adversely affect the grant of the construction permit, intentionally concealed the presence of the alien partner.”<sup>8</sup> The Commission further explained that “[t]he record in this case ... reflects that Alee, aware that it had an alien partner, filed an amendment representing that all of its partners were United States citizens. Whether it did so on the advice of counsel, or its own initiative, and whether it understood the precise legal consequences of reporting false information (*i.e.*, that lack of candor is absolutely disqualifying), Alee did not need to consult an attorney, let alone communications counsel, in order to appreciate that information filed with a federal agency should be truthful.”<sup>9</sup> The Commission found that “the record establishes a sufficient likelihood of intentional concealment of relevant information . . . .”<sup>10</sup>

4. Finally, the Commission was “unimpressed” by “Alee's ‘voluntary’ reporting of this matter to the Commission in its April 30, 1990 letter to the FCC Secretary.”<sup>11</sup> While the Commission acknowledged that Alee's letter was the basis for the specification of lack of candor and alien ownership issues against it, the Commission concluded that Alee both delayed reporting the matter and failed to make a full disclosure of the facts related to Mr. Sharifan and his replacement in the partnership.<sup>12</sup> The

<sup>3</sup> In re Applications of ALGREG Cellular Engineering, et al., *Hearing Designation Order*, 6 FCC Rcd 2921, 2928 (Com. Car. Bur. 1991).

<sup>4</sup> *Id.*

<sup>5</sup> *Algreg I*, 12 FCC Rcd at 8172-8181. The Commission also concluded that participation in the risk-sharing arrangement was not a basis for the denial of pending applications or the revocation of licenses, including that held by Alee in NM 3. *Id.* at 8157-8169. The foreign ownership issue also was determined not to provide a basis for revoking Alee's authorization in light of changes made to Section 310(b) by the Telecommunications Act of 1996. *Id.* at 8170-8171.

<sup>6</sup> In addition, the Commission's rules at that time explicitly prohibited precisely the type of transaction undertaken by Alee to replace its non-U.S. partner. *See id.* at 8175.

<sup>7</sup> *Id.* at 8175.

<sup>8</sup> *Id.* at 8176; *see id.* at 8176-8181.

<sup>9</sup> *Id.* at 8176.

<sup>10</sup> *Id.* at 8175.

<sup>11</sup> *Id.* at 8180-8181.

<sup>12</sup> *Id.*

Commission found that “[t]he failure to fully disclose the facts involving Sharifan’s participation in a timely manner, together with Bernstein’s dubious testimony on this matter, significantly undercuts the claim that the ‘voluntary’ reporting of these matters belies any intent to deceive the Commission.”<sup>13</sup>

5. The Commission rejected Alee’s request for reconsideration regarding the finding of lack of candor and the revocation of Alee’s NM 3 cellular license.<sup>14</sup> In addressing the request for reconsideration, the Commission found that Alee had presented no new evidence that would warrant any reconsideration.<sup>15</sup> The Commission also distinguished Alee’s situation from those of NextWave and PCS 2000, where the Commission did not revoke any licenses but allowed the applicant to undertake remedial action.<sup>16</sup>

6. Alee appealed the Commission’s action to the D.C. Circuit Court of Appeals. After briefing and oral argument, the Court affirmed the Commission’s action, “essentially for the reasons stated by the Commission.”<sup>17</sup> The Court stated:

Substantial evidence supported the Commission’s determination that Alee Cellular Communications lacked candor in failing to reveal that it had an alien general partner and that there had been a change in its partnership structure. The Commission independently reviewed the record of the evidentiary hearing, examining both the testimony of the Alee witnesses and the significant documentary evidence. This evidence was sufficient to support the Commission’s conclusion that Alee’s partners knowingly and intentionally withheld relevant information from the Commission. *Algreg Cellular Eng’g*, 12 F.C.C.R. 8148, 8172-80 (1997). The Commission thus had ample basis to sanction Alee for its misconduct. The Commission’s decision to revoke Alee’s license for its lack of candor lies well within the agency’s broad discretion to apply an appropriate sanction to licensee misconduct. *West Coast Media, Inc. v. FCC*, 695 F.2d 617, 622 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 816 (1983).<sup>18</sup>

The D.C. Circuit denied Alee’s petition for rehearing on April 5, 2001, and the Supreme Court denied Alee’s petition for writ of certiorari on October 9, 2001.<sup>19</sup>

### III. DISCUSSION

7. Alee filed the above-referenced application for the Texas 21 RSA on October 8, 1988, and was chosen as the tentative selectee on April 8, 1992, during a re-lottery of the market applications.<sup>20</sup>

---

<sup>13</sup> *Id.*

<sup>14</sup> *See Algreg II*, 14 FCC Rcd at 18533-18535.

<sup>15</sup> *Id.* at 18534.

<sup>16</sup> *Id.* at 18535. *See also* NextWave Personal Communications, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 2030 (1997); PCS 2000, L.P., *Memorandum Opinion and Order*, 12 FCC Rcd 1681 (1997); PCS 2000, L.P., *Notice of Apparent Liability for Forfeiture*, 12 FCC Rcd 1703 (1997).

<sup>17</sup> *Alee Cellular Communications v. FCC*, No. 99-1460, slip op. at 1 (D.C. Cir. Jan. 31, 2001).

<sup>18</sup> *Id.*

<sup>19</sup> *Alee Cellular Communications*, No. 01-15, pet. for writ of cert. denied (S.Ct. Oct. 9, 2001).

<sup>20</sup> *See* FCC Public Notice, *Common Carrier Mobile Services Information, Results of Cellular Lottery*, Rpt. No. CL-92-76 (rel. Apr. 9, 1992). The application, which was signed on August 6, 1988, identified Shafi M.

(continued....)

In the *Texas 21 Dismissal Order*, the Policy and Rules Branch of the Commercial Wireless Division of the Wireless Telecommunications Bureau denied the above-referenced Alee application, finding that, “[b]ecause the Commission determined in *ALGREG* that Alee lacks the character qualifications required of licensees, we deny Alee’s instant application for the same reasons.”<sup>21</sup> The Branch also dismissed the petition to deny filed by Applicants Against Lottery Abuse as moot.<sup>22</sup>

8. Alee then filed the pending petition for reconsideration of the February 15, 2000 *Memorandum Opinion and Order*. Alee argued that: 1) denial of the Texas 21 application was premature, since the *Algreg* finding is still subject to the appellate review process;<sup>23</sup> 2) the *Algreg* determination is limited to the NM3 license and should not be applied to the Texas 21 application;<sup>24</sup> and 3) “Alee is entitled to an opportunity to present any mitigating factors in support of the grant of the Texas 21 application before the Commission makes a final determination.”<sup>25</sup>

9. Alee’s first argument is moot, since the *Algreg* finding is no longer subject to appellate review and thus is a final order.<sup>26</sup> Regarding its second claim, Alee is incorrect that the *Algreg* findings are not applicable to the Commission’s consideration of the Texas 21 application. The Commission has made clear that applicant and licensee candor is a fundamental character quality that goes to the overall qualifications of an entity to hold a license; it is not limited to the merits of a single application.<sup>27</sup> In *Algreg I* and *II*, the Commission conclusively determined that Alee lacked candor with respect to its application and related filings for the NM 3 authorization,<sup>28</sup> and the Commission is entitled to take that finding into account when assessing Alee’s qualifications to hold another Commission license. Regarding Alee’s third claim, however, we do grant Alee’s TX21 Petition for Reconsideration in part and reinstate its application for the Texas 21 authorization, File No. 11025-CL-P-672-A-89, to pending status. Given that we are unable to make the public interest determination required by Section 309(e) of the Act based on Alee’s prior disqualification in a proceeding that did not involve Texas 21, we will designate Alee’s application for an evidentiary hearing. This hearing will be limited to determining whether the finding of disqualifying lack of candor on the part of Alee in the *Algreg* proceeding also disqualifies Alee from being granted the Texas 21 authorization, or whether there has been subsequent and sufficient rehabilitation on the part of Alee in the interim to support grant of its Texas 21 application. We underscore that this hearing shall not be used by Alee to relitigate the Commission’s findings in *Algreg* concerning Alee’s lack of candor, since those findings are fully binding on Alee at this time.

---

(...continued from previous page)

Sharifan, who was not in 1988 a U.S. citizen, as a general partner in Alee. Alee’s section 1.65 amendment, submitted following its selection as the tentative selectee in the 1992 re-lottery, indicated that Sharifin’s interest in Alee had been assigned to a U.S. citizen as of September 23, 1988, and thus he was not a partner in Alee when the subject application was filed. The amendment also advised the Commission of the pending show cause proceeding (*ALGREG*) concerning Alee’s NM 3 authorization and made other corrections.

<sup>21</sup> *Texas 21 Dismissal Order*, 15 FCC Rcd at 2831-2832.

<sup>22</sup> *Id.* at 2831 n.3.

<sup>23</sup> Alee TX21 Petition for Reconsideration at 4.

<sup>24</sup> *Id.* at 4-7.

<sup>25</sup> *Id.* at 7.

<sup>26</sup> *See supra*, ¶ 6.

<sup>27</sup> *See, e.g.*, *Pass Word, Inc.*, 76 FCC Rcd 465 (1980), *aff’d per curiam Pass Word, Inc. v. FCC*, 673 F.2d 1363 (D.C. Cir. 1982).

<sup>28</sup> *Algreg I*, 12 FCC Rcd at 8172-8181; *Algreg II*, 14 FCC Rcd at 18533-18535.

#### IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that, pursuant to section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, Alee's petition for reconsideration is GRANTED IN PART and OTHERWISE DENIED, to the extent explained above.

11. IT IS FURTHER ORDERED that Alee's application for the Texas 21 RSA cellular authorization, File No. 11025-CL-P-672-A-89, is RETURNED to pending status.

12. IT IS FURTHER ORDERED that, pursuant to Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(e), the above-captioned application is designated for hearing in a proceeding before an FCC Administrative Law Judge, at a time and place to be specified in a subsequent order, upon the following issues:

a. To determine, based on previously adjudicated lack of candor on the part of Alee in *Algreg I*,<sup>29</sup> whether Alee is qualified to be a Commission licensee in Texas RSA 21 – Market 672A.

b. To determine, in light of the foregoing, whether Alee's pending application for an authorization to construct a nonwireline cellular system in Texas RSA 21 – Market 672A should be granted.

13. IT IS FURTHER ORDERED that, to avail itself of the opportunity to be heard and to avail itself of the right to present evidence at a hearing in these proceedings, pursuant to section 1.221(c) of the Commission's rules, 47 C.F.R. § 1.221(c), Alee shall, in person or by its attorneys, file, within 20 days of the mailing of this Hearing Designation Order, a written appearance stating that it will appear at the hearing and present evidence on matters specified in this Order. If a written notice of appearance is not timely filed on behalf of Alee within 20 days of the mailing of this Hearing Designation Order, the captioned application will be dismissed with prejudice. *See* 47 C.F.R. § 1.221.

14. IT IS FURTHER ORDERED that the Enforcement Bureau is made a party to this proceeding.

15. IT IS FURTHER ORDERED that, pursuant to Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(e), and section 1.254 of the Commission's rules, 47 C.F.R. § 1.254, the burden of proceeding with the introduction of evidence and the burden of proof shall be upon Alee with respect to the issues designated under para. 12 above.

16. IT IS FURTHER ORDERED that the Chief, Wireless Telecommunications Bureau shall send a copy of this Order via certified mail, return receipt requested, to Alee and its counsel at the following addresses:

David L. Hill  
Audrey P. Rasmussen  
Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.  
Suite 700 North Building  
1120 20<sup>th</sup> Street, N.W.  
Washington, D.C. 20036-3406

---

<sup>29</sup> 12 FCC Rcd at 8172-8181.

Philip J. Mause  
Drinker Biddle & Reath LLP  
1500 K Street, N.W.  
Suite 1100  
Washington, D.C. 20005-1209

Alee Cellular Communications  
602-7 College Avenue  
Clemson, SC 29631

17. IT IS FURTHER ORDERED that the Secretary of the Commission shall cause this Order or a summary thereof to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton  
Acting Secretary